

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING**

75-1246

original

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P/S

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

FERGUS M. SLOAN JR., et al,

Appellant.

ON A PETITION FOR RE-HEARING FROM AN ORDER OF THE UNITED
STATES FOR THE SECOND CIRCUIT ENTERED MARCH 8, 1976.

PETITION FOR RE-HEARING

SAXE, BACON & BOLAN, P.C.
Attorneys for Appellant
39 East 68th Street
New York, New York 10021
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ROY M. COHN and

MICHAEL ROSEN

OF COUNSEL

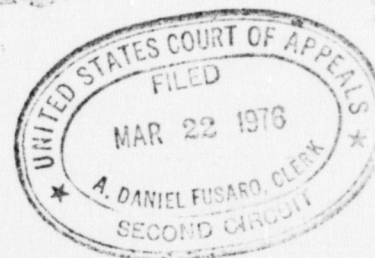


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Appellee, : Index No. 75-1246

-against- :

FERGUS M. SLOAN JR., et al, :

PETITION
FOR
RE-HEARING

Appellant. :

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S I R :

PLEASE TAKE NOTICE that upon the annexed affidavit of
MICHAEL ROSEN ESQ., sworn to on the ^{18th} day of March, 1976,
the decision of the United States Court of Appeals for the
Second Circuit, dated March 8, 1976, and all the pleadings and
proceedings heretofore had herein the undersigned attorneys
for the appellant will move this Court at such time, date and
place as the Court may direct for an order:

(a) Pursuant to Rule 40 of the Federal Rules of
Appellate Procedure granting re-hearing of the appeal on behalf
of the appellant Fergus M. Sloan in this matter;

(b) For an order pursuant to Rule 35 of the Federal
Rules of Appellate Procedure directing a re-hearing in banc
upon the suggestion of the appellant Fergus M. Sloan.

(c) For an order pursuant to Rule 41 of the Federal
Rules of Appellate Procedure granting a stay of the issuance
of the mandate of this Court in this matter pending a hearing
and determination of this petition for a re-hearing of the
application;

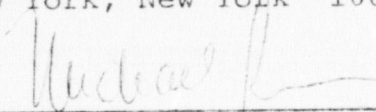
(d) For such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
March 18, 1976

Yours, etc.,

SAXE, BACON & BOLAN, P.C.
Attorneys for Appellant
Fergus M. Sloan Jr.
39 East 68th Street
New York, New York 10021

By


A Member of the Firm

TO: United States Attorney
Southern District of New York
One Saint Andrews Plaza
New York, New York 10007

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - -X
UNITED STATES OF AMERICA, :
Appellee, : Index No. 75-1246
-against- :
FERGUS M. SLOAN JR., et al, : AFFIDAVIT
Appellant. :
- - - - -X

MICHAEL ROSEN, being duly sworn, deposes and says:

I am a member of the firm SAXE, BACON & BOLAN, P.C., attorneys for the appellant Fergus M. Sloan Jr., and submit this affidavit in support of the foregoing petition for re-argument with a suggestion for a re-hearing in banc. It is respectfully submitted that a re-hearing should be granted to the appellant upon his appeal in this matter.

On September 10, 1974, the appellant Fergus M. Sloan Jr. and four co-defendants were indicted for violations of the Federal Securities Laws. On March 31, 1975, Sloan pled guilty to one count of the conspiracy. As this Court found in its appeal, "[t]he Assistant United States who represented the Government on the trial promised Sloan that if he pleaded guilty and co-operated in the preparation and presentation of the case against Anderson, the Government would 'go to bat' for him". United States v. Eucker et al, 75-1246, September Term, 1975; decided March 8, 1976 Slip op. 2459, 2470. Thus it is evident, as this Court found, that once Sloan pleaded guilty and co-operated with the Government, his obligations under the agreement

terminated. At that point, the only obligation of any party was that of the Government in that it was required to "go to bat" for Sloan. As conceded by the Government it refused to do so solely upon the subjective determination of the Assistant United States Attorney in charge of the case.

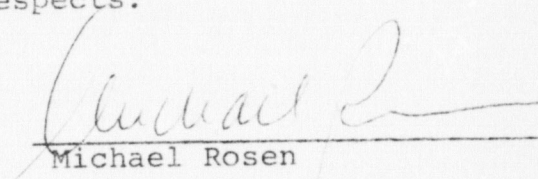
There was no need for Sloan to prove his credibility or value as a witness. Once he provided the Government with information concerning Anderson his obligation ceased. There was no requirement, and the Court in its initial decision, does not point to one, that Sloan's information had to assist the Government or add to its knowledge of Anderson's activities. This Court describes Sloan's "willingness to testify" as not being in conformity with his agreement. However, this determination is based solely on the Government's determination that such testimony would be false. There has been no determination by any judicial body as such would have been the case. We would submit that the sole reason for the Government's failure to abide by its term of the agreement was the fact that in all probability, Sloan's information did not in anyway strengthen their case against Anderson, not that it was in anyway false.

Since this Court determined that there was an agreement and that Sloan abided thereby (albeit not to the liking of the Government), the Government was none the less obligated to intercede on Sloan's behalf. It would seem rather unfortunate if a defendant after having placed his trust in the representative of the United States Government and attempting to co-operate

with the prosecutor, could not rely on representations made by the latter. Mr. Sloan has stated under oath, in his affidavit in support of his Rule 32 motion to the District Court that he did in fact co-operate with the Government in good faith. Having done so, it is in contravention of all known principles of justice for a prosecutor to subsequently renege on an agreement made to a defendant and his attorney. By virtue of the seriousness of this situation and the seeming conflict among the Circuits on this issue it is respectfully suggested that a re-hearing in this matter be granted in banc.

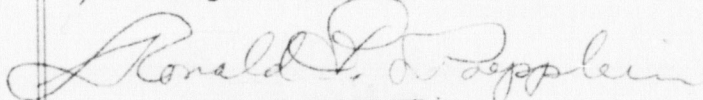
Mr. Sloan has been sentenced to a period of imprisonment for one year and one day. There are no allegations of any violence in this matter and never have been. Due to the seriousness of the allegations raised in this petition and in the prior appeal, it is respectfully suggested that pending a determination of this application the mandate of the Court for Mr. Sloan's incarceration be stayed until such time as the Court determines this petition.

WHEREFORE, it is respectfully requested that this application be granted in all respects.


Michael Rosen

Sworn to before me this

18th day of March, 1976



RONALD F. POEPPLEIN
NOTARY PUBLIC, STATE OF NEW YORK
No. 30-4608069
Qualified in Nassau County
Commission Expires March 30, 1977



COPY RECEIVED
Robert B. Fiske, Jr.
MAR 22 1976
U.S. ATTORNEY
SO. DIST. OF N.Y.

ROBERT B. FISKE, JR.
NOTARY PUBLIC - STATE OF NEW YORK
No. 30-100000
-Sealed in New York County
Commission Expires March 30, 1977